TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 582.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR.

vs.

MORRIS BEHRMAN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 13, 1921.

SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the District Court of the United States for the Southern District of New York, greeting:

Because, in the record and proceedings and also in the rendition of the judgment of a plea which is in the District Court before you, or some of you, between the United States of America, plaintiff in error, and Morris Behrman, defendant in error, a manifest error hath happened to the great damage of the United States of America, plaintiff in error, as is said and appears by said judgment and the complaint of the said United States of America, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the Supreme Court of the United States at the Capitol at Washington, in the District of Columbia, together with this writ, so that you have the same at the said place before the judges aforesaid, on October 21, 1921, that the record and proceedings aforesaid, being inspected, the said judges of the Supreme Court of the United States may cause further to be done therein, to correct that error,
2 what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, this 22nd day of September, in the year of Our Lord, one thousand nine hundred and twenty-one and of the Independence of the United States the one hundred and forty-sixth.

[L. S.] ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

WM. B. SHEPPARD,
U. S. District Judge.

3 United States Supreme Court. Court Docket No. 28/425. The United States of America, plaintiff in error, *versus* Morris Behrman, defendant in error. Writ of error and allowance. William Hayward, United States Attorney, Attorney for U. S. Due service of a copy of the within is hereby admitted. New York, September 27, 1921. Basch & Kulkin, attorneys for defendant. Filed Sept. 22, 1921. U. S. District Court, S. D. of N. Y.

4 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Alex Gilchrist, jr., clerk of the District Court of the United States of America, for the Southern District of New York, in the

Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages numbered from 5 to 14 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of The United States of America, plaintiff in error, against Morris Behrman, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 11th day of October, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the United States the one hundred and forty-sixth.

[SEAL.] ALEX GILCHRIST, JR.,
Clerk.

5 *Indictment.*

In the District Court of the United States of America for the Southern District of New York.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The grand jurors of the United States of America duly empaneled and sworn in the District Court of the United States for the Southern District of New York and inquiring for that district, upon their oath, present:

That heretofore, to wit, on June 10, 1919, in the Borough of Manhattan, city, county, State and Southern District of New York and within the jurisdiction of this court, Morris Behrman, hereinafter called the defendant, did unlawfully sell, barter, and give to Willie King, a compound, manufacture, and derivative of opium, to wit, 150 grains of heroin and 360 grains of morphine, and a compound, manufacture, and derivative of coca leaves, to wit, 210 grains of cocaine, not in pursuance of any written order of the said Willie King on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States; that is to say, that at the time and place aforesaid the defendant being a physician duly licensed to practice as such and duly registered under the act of December 17, 1914, as amended by the act of February 24, 1919, did issue and give to the said Willie King three written orders in the form of prescriptions signed by him and which said orders called for the delivery to said Willie King of 150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine, respectively, the said heroin and morphine being derivatives of opium and the said cocaine being a derivative of coca leaves, as defendant then and there well knew; that at the time and place aforesaid, the defendant in issuing the said three orders in the form of prescriptions, and

6 giving same to the said Willie King, intended and purposed that the said Willie King would obtain the said drugs from a druggist upon said orders; that thereafter and at the place and on

the date aforesaid the said Willie King did obtain upon said orders, so issued and given to him by the defendant, from one Samuel Siegel, a duly licensed pharmacist registered under the act of December 17, 1914, as amended by the act of February 24, 1919, 150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine, which said drugs were obtained from the said Samuel Siegel pursuant to the said three orders in the form of prescriptions so issued by the defendant and not in pursuance of any written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States; that on said date the said Willie King was a person addicted to the habitual use of morphine, heroin, and cocaine and known by the defendant to be so addicted; that on said date the said Willie King did not require the administration of either morphine, heroin, or cocaine by reason of any disease or condition other than such addiction, and the defendant did not dispense said drugs or any of them to said Willie King for the purpose of treating any disease or condition other than such addiction; that none of the said drugs so dispensed by the defendant was administered or intended by the defendant to be administered to the said Willie King by the defendant or by any nurse or person, other than the said Willie King, acting under the direction of the defendant, nor were any of said drugs consumed or intended by the defendant to be consumed by the said Willie King in the presence of the defendant, but all of said drugs were put in the physical possession and control of the said Willie King with the intention on
7 the part of the defendant that said Willie King would use same by self-administration in divided doses over a period of several days, the amount of each of said drugs dispensed as aforesaid being more than sufficient or necessary to satisfy the craving of the said Willie King therefor if consumed by him all at one time; that said Willie King was not, at the time and place aforesaid, nor was he intended by the defendant to be, during the period in which the drugs dispensed as aforesaid were to be used by him, under the observation and physical control of the defendant or of any nurse or other person acting under the direction of the defendant, nor was said Willie King in any way restrained or prevented from disposing of said drugs in any manner he might see fit; that said drugs dispensed by the defendant to the said Willie King as aforesaid were not mixed with any other substance, medicinal or otherwise, but were in the form in which said drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their craving therefor and were adapted for such consumption; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 2 of the act of December 17, 1914, 38 U. S. Stat. L., p. 785–6, as amended by the act of February 24, 1919, 40 U. S. Stat. L., p. 1130.)

WILLIAM HAYWARD,
United States Attorney.

Endorsed: Indictment. Giving, bartering, and selling morphine heroin, and cocaine. (Act of December 17, 1914, as amended by the Act of February 24, 1919.) William Hayward, U. S. Attorney. A true bill: Louis W. Greeman, Foreman. U. S. District Court, S. D. of N. Y. Filed June 30, 1921.

1921:

Jul. 18 Deft. pleads not guilty Bail $2500.
Filed demurrer

Sept. 21 Filed judgment sustaining demurrer and dismissing indictment.

" 22 Filed citation & writ of error U S Supreme Court

SHEPPARD, J.

8 *Demurrer.*

UNITED STATES DISTRICT COURT,
Southern District of New York:

THE UNITED STATES, PLAINTIFF,
against
MORRIS BEHRMAN, DEFENDANT.

The above-named defendant hereby demurs to the indictment No. 28-425, filed against him in this court, on the grounds that it appears on the face thereof,

First. That the facts alleged in said indictment do not constitute a crime.

Second. That the facts alleged in said indictment do not constitute a crime, because they show that the selling and giving of the drugs were done by the defendant in his professional capacity as a duly licensed and registered physician, by dispensing said drugs by means of prescriptions therefor, which were filled by a druggist, and that said dispensing of the drugs, by the defendant, was to a patient, Willie King, in the course of his professional practice only, as defendant had a legal right to do under exception a, of section 2, of the act of December 17th, 1914, as amended.

Third. That the facts alleged in said indictment do not constitute a crime, because they show that the said selling and giving of the drugs were done by the said defendant in his professional capacity as a physician, by dispensing said drugs to a patient, Willie King, suffering from addiction to the drug dispensed, said dispensing being by means of prescriptions therefor, which were filled by a druggist, there being no allegations in said indictment sufficient to show

9 that the said defendant in dispensing said drugs was not dispensing same in the course of his professional practice only, as he had a legal right to do under exception a, of section 2, of said act of December 17th, 1914, as amended.

Fourth. That the facts alleged in said indictment do not constitute a crime, because it is not therein alleged that the defendant dispensed said drugs wilfully, and there is no allegation that the

defendant in dispensing said drugs acted with criminal intent, and no allegation from which it can be inferred that defendant acted wilfully or with criminal intent.

Fifth. That the facts alleged in said indictment do not constitute a crime, because they are consistent with defendant's innocence and an honest and sincere purpose and intention on his part to cure Willie King of his addiction to the use of the drugs dispensed, or to permanently better his physical condition due to such addiction.

Wherefore, the defendant asks judgment of the Court, that he be dismissed and discharged from the said premises specified in the said indictment.

Dated, New York, July 15th, 1921.

BASCH & KULKIN,
Attorneys for Defendant, O. & P. O. Address,
1265 Broadway, Borough of Manhattan, City of New York.
ARTHUR G. BASCH, *Of Counsel.*

U. S. District Court S. D. of N. Y. Filed July 18, 1921.

10 *Judgment sustaining demurrer and dismissing indictment and memorandum, Sheppard, D. J.*

UNITED STATES DISTRICT COURT,
Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MORRIS BEHRMAN, DEFENDANT. } C. 28/425.

An indictment against Morris Behrman, the defendant above named, having been found and filed by the grand jurors in and for the Southern District of New York on June 30, 1921, and thereafter the defendant having been arraigned and having interposed a demurrer to said indictment on July 18, 1921, and thereafter Arthur G. Basch, Esq., having been heard in support of said demurrer, and Peter B. Olney, jr., assistant United States attorney, having been heard on behalf of the United States.

Now upon motion of Messrs. Basch & Kulkin, Esqs., attorneys for the defendant, it is

Ordered and adjudged that the demurrer be and the same hereby is sustained and the said indictment be and the same hereby is dismissed.

Dated: New York, September 21st, 1921.

WM. B. SHEPPARD,
U. S. District Judge.

Memo:

In my opinion the so-called "ambulatory treatment" is a perversion of the spirit of the Harrison Act and contrary to the reason of the law. Prescriptions in the regular "course of practice" to a patient does not include the indiscriminate or continued doling out

of narcotics to addicts, on the pretense of treatment for the habit, but whether the prescription of the "practising physician in regular course" amounts to an infraction of the act depends on the particular facts of each case. The Webb and Doremus cases cited in the briefs rule the question raised by this demurrer.

10a A different conclusion having been reached by Judge Knox in this district, for the sake of uniformity in this district, however, I am disposed to follow precedent until the question is concluded by a decision of the Supreme Court.

Service admitted. U. S. District Court, S. D. of N. Y. Filed Sept. 21, 1921.

11 *Docket entries.*

UNITED STATES DISTRICT COURT,
Southern District of New York.

UNITED STATES *vs.* MORRIS BEHRMAN.	C 28–425. For defendant: Basch & Kulkin, 1265 Bway. Selling narcotics. Act 12–17/14.

1921:
Jun. 30. Filed indictment.
Jul. 18. Defendant pleads not guilty.
" 18. Filed demurrer.
Sep. 21. Filed judgment sustaining demurrer and dismissing indictment and memo., Sheppard, D. J.
" 22. Filed petition for allowance of writ of error.
" 22. Filed assignment of errors.
" 22. Filed citation U. S. Supreme Court, ret. Oct. 21, 1921.
" 22. Filed writ of error and allowance.

12 *Petition for allowance of writ of error.*

UNITED STATES DISTRICT COURT,
Southern District of New York.

UNITED STATES OF AMERICA, Plaintiff in error, *against* MORRIS BEHRMAN, Defendant in error.	Petition for allowance of writ of error.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The above-named plaintiff in error, United States of America, by William Hayward, United States Attorney for the Southern District of New York, feeling aggrieved by the judgment entered herein on September 21, 1921, sustaining the demurrer to the indictment herein, and dismissing the said indictment, and which said judgment is based upon a construction of the statute upon which the said in-

dictment is founded, namely, the act of December 17, 1914, 38 U. S. Stat. L., p. 785-6, as amended by the act of February 24, 1919, 40 U. S. Stat. L., p. 1130, petitions this court for an order allowing the United States of America to prosecute a writ of error to the Supreme Court of the United States for the reasons specified in the assignments of error which are filed herein, and the said United States of America prays that this writ of error will be allowed and that a transcript of the legal proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the said court.

Dated: New York, N. Y., September 22, 1921.

WILLIAM HAYWARD,
United States Attorney for the Southern District of New York, Attorney for Plaintiff in error, United States of America. Office & P. O. address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

Service admitted. U. S. District Court, S. D. of N. Y., filed Sep. 22, 1921.

13 UNITED STATES DISTRICT COURT,
Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF IN error,
Against
MORRIS BEHRMAN, DEFENDANT IN ERROR. } Assignments of Error.

Now comes the United States of America, plaintiff in error, by William Hayward, United States Attorney for the Southern District of New York, its attorney, and makes its assignments of error, respectfully showing that the court below erred in each of the following particulars:

1. In making its judgment sustaining the demurrer to the indictment herein, and dismissing the indictment against the above-named defendant in error.

2. In construing the statute upon which the indictment is founded, namely, the act of December 17, 1914, 38 U. S. Stat. L., p. 785-6, as amended by the act of February 24, 1919, 40 U. S. Stat. L., p. 1130, so as to hold that the said indictment does not state a crime and is fatally defective, because it does not appear, from the allegations of said indictment, that the said acts therein alleged to have been done by the defendant, were done wilfully or with criminal intent.

3. In construing the said statute, so as to read into it the word "wilfully."

4. In construing the said statute, so as to hold that it does not forbid the acts of said indictment alleged to have been done by the said defendant, regardless of the purpose or intent of the defendant in doing said acts.

14 5. In construing the said statute, so as to hold that the acts therein alleged to have been done by the defendant were

or might have been done by him "in the course of his professional practice only."

Wherefore, plaintiff in error prays that said judgment be reversed and that such proceedings be thereafter had accordingly.

WILLIAM HAYWARD,
United States Attorney for the Southern District of New York, Attorney for Plaintiff in error. Office & P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

Service admitted. U. S. District Court, S. D. of N. Y. Filed, Sep. 22, 1921.

14a *By the Honorable William B. Sheppard, one of the judges of the District Court of the United States duly assigned to the Southern District of New York in the Second Circuit, to the defendant Morris Behrman, greeting:*

You are hereby cited and admonished to be and appear before the United States Supreme Court to be holden at the Capitol at Washington, District of Columbia, on October 21st, 1921, pursuant to a writ of error filed in the office of the clerk of the United States District Court for the Southern District of New York, wherein the United States of America is plaintiff in error and Morris Behrman is defendant in error, to show cause if any there be, why the judgment sustaining the demurrer herein and dismissing the indictment found against the said Morris Behrman, defendant in error, in said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness: Honorable Learned Hand, United States District Judge for the Southern District of New York, at New York City, in the said Southern District of New York, this 22nd day of September, 1921.

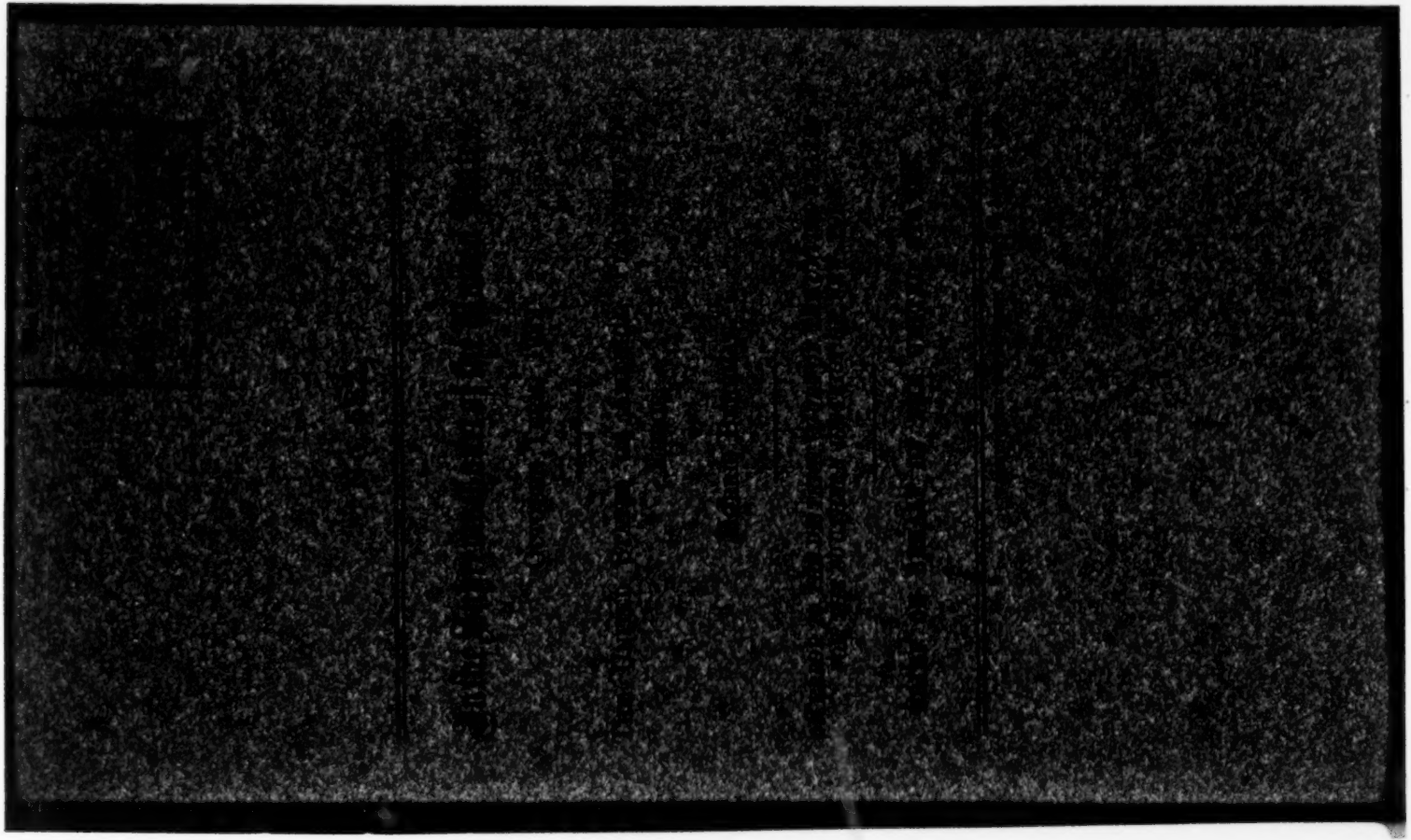
WM. B. SHEPPARD,
United States District Judge.

15 United States Supreme Court. Court Docket No. 28,425.

The United States of America, plaintiff in error, versus Morris Behrman, defendant in error. Citation. William Hayward, United States Attorney, attorney for U. S. Due service of a copy of the within is hereby admitted. New York, September 27, 1921. Basch & Kulkin, attorneys for defendant. Filed Sep 22, 1921. U. S. District Court, S. D. of N. Y.

(Indorsed:) United States District Court, Southern District of New York. The United States of America against Morris Behrman. Transcript of record on writ of error.

(Indorsed on cover:) File No. 28,537. S. New York D. C. U. S. Terms No. 582. The United States of America, plaintiff in error, vs. Morris Behrman. Filed October 13th, 1921. File No. 28,537.



INDEX.

CITATIONS.

CASES.

STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE UNITED STATES OF AMERICA, Plaintiff in Error,
v.
MORRIS BEHRMAN. } No. 582.

ON ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

The defendant in error (hereinafter called the defendant) was indicted in the Southern District of New York for a violation of the Harrison Narcotic Act of December 17, 1914, c. 1, 38 Stat. 786. (R. 2, 3.) The indictment was demurred to, the demurrer was sustained (R. 5, 6), and this writ of error was sued out under the authority of the Criminal Appeals act of March 2, 1907, c. 2564, 34 Stat. 1246.

THE STATUTE.

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such

article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, territorial, district, municipal, and insular officials named in section five of this act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned. Nothing contained in this section shall apply—

(*a*) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice only: *Provided*, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address

of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this act.

(*b*) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this act: *Provided, however*, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further*, That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned.

THE INDICTMENT.

As the case turns entirely upon the exact language of the indictment which specifies the alleged offense in detail, so that every portion of it may be material to the present discussion, it is thought best to give it in full:

> The grand jurors of the United States of America duly empaneled and sworn in the District Court of the United States for the

Southern District of New York, and inquiring for that district, upon their oath, present:

That heretofore, to wit, on June 10, 1919, in the borough of Manhattan, city, county, State, and Southern District of New York, and within the jurisdiction of this court, Morris Behrman, hereinafter called the defendant, did unlawfully sell, barter, and give to Willie King, a compound, manufacture, and derivative of opium, to wit, 150 grains of heroin and 360 grains of morphine, and a compound, manufacture, and derivative of coca leaves, to wit 210 grains of cocaine, not in pursuance of any written order of the said Willie King on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States; that is to say, that at the time and place aforesaid the defendant, being a physician duly licensed to practice as such and duly registered under the act of December 17, 1914, as amended by the act of February 24, 1919, did issue and give to the said Willie King three written orders in the form of prescriptions signed by him and which said orders called for the delivery to said Willie King of 150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine, respectively, the said heroin and morphine being derivatives of opium and the said cocaine being a derivative of coca leaves, as defendant then and there well knew; that at the time and place aforesaid the defendant, in issuing the said three orders in the form of prescriptions and giving same to the said Willie King, intended and purposed that the said Willie King would obtain the said drugs from a druggist upon said

orders; that thereafter and at the place and on the date aforesaid the said Willie King did obtain upon said orders, so issued and given to him by the defendant, from one Samuel Siegel, a duly licensed pharmacist registered under the act of December 17, 1914, as amended by the act of February 24, 1919, 150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine, which said drugs were obtained from the said Samuel Siegel pursuant to the said three orders in the form of prescriptions so issued by the defendant and not in pursuance of any written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States; that on said date the said Willie King was a person addicted to the habitual use of morphine, heroin, and cocaine and known by the defendant to be so addicted; that on said date the said Willie King did not require the administration of either morphine, heroin, or cocaine by reason of any disease or condition other than such addiction, and the defendant did not dispense said drugs or any of them to said Willie King for the purpose of treating any disease or condition other than such addiction; that none of the said drugs so dispensed by the defendant was administered or intended by the defendant to be administered to the said Willie King by the defendant or by any nurse or person, other than the said Willie King, acting under the direction of the defendant, nor were any of said drugs consumed or intended by the defendant to be consumed by the said Willie King in the presence of the de-

fendant, but all of said drugs were put in the physical possession and control of the said Willie King with the intention on the part of the defendant that said Willie King would use same by self-administration in divided doses over a period of several days, the amount of each of said drugs dispensed as aforesaid being more than sufficient or necessary to satisfy the craving of the said Willie King therefor if consumed by him all at one time; that said Willie King was not, at the time and place aforesaid, nor was he intended by the defendant to be, during the period in which the drugs dispensed as aforesaid were to be used by him, under the observation and physical control of the defendant or of any nurse or other person acting under the direction of the defendant, nor was said Willie King in any way restrained or prevented from disposing of said drugs in any manner he might see fit; that said drugs dispensed by the defendant to the said Willie King as aforesaid were not mixed with any other substance, medicinal or otherwise, but were in the form in which said drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their craving therefor and were adapted for such consumption; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

QUESTION INVOLVED.

The question raised by the indictment and the demurrer thereto, and decided by the court adversely to the United States.

The purpose of this indictment and of the present writ of error is to raise for the determination of this court the following question, viz., whether the so-called "ambulatory treatment" of drug addicts by a physican is or is not, *as a matter of law*, prohibited by section 2 of the Harrison Narcotic Act of December 17, 1914, c. 1. By the term "ambulatory treatment" is meant the treatment by a physician of a drug addict, for the alleged cure of his drug addiction, by giving to him a prescription for the amount of the drug which the physician, in good faith, believes to be necessary in the condition of the drug addict at the time the prescription is given, for his use as one dose or over a period of time, and allowing the addict to take the prescription and to use it in any manner he may see fit, without any supervision or control of the doctor over him in any manner or form whatsoever.

Having in mind the raising of this question for the determination of this court, the indictment alleged in effect that the defendant, being a duly licensed and registered physician, gave a prescription for a very large amount of heroin, morphine and cocaine to Willie King; that Willie King was a drug addict to the defendant's knowledge, and was suffering from no other disease than drug addiction; that the de-

fendant gave him this prescription for heroin, morphine and cocaine not in order to cure any disease, other than drug addiction; that he allowed Willie King to leave his office and get the prescription filled at a drug store (which Willie King did) without exercising, or intending to exercise, any supervision or control whatsoever over Willie King either by himself or by any agent of his; and that it was his intention that Willie King should administer these drugs to himself, without supervision or control of the defendant, in divided doses over a period of several days, the amount of drugs covered by the prescription being (as any one would immediately perceive) more than Willie King could possibly use himself at that time.

The theory of the indictment is that this action upon the part of the defendant was, not a question for the jury, either on the defendant's intent, or as to what constituted the legitimate practice of his profession, but a violation of the Harrison Narcotic Act *as a matter of law*, since such a method of treatment was not the treatment of a "patient" "in the course of his professional practice only," within the meaning of these words in section 2 of the Harrison Narcotic Act.

In order to advise this court of the necessity which induced the Government to raise this question by the present indictment, the following is quoted from an actual charge to the jury by a Federal court in the southern district of New York, with the statement

that this charge fairly represents the attitude of the Federal judges in the interpretation of the statute:

> That it makes no difference whether the treatment of his patients by Dr. Lasse was helpful or harmful; whether his treatment benefited his patients or not; whether his methods were approved by the medical profession or not; whether the treatment he prescribed was correct treatment or incorrect treatment; and whether it was old or new; if Dr. Lasse did what he did honestly, believing that his treatment was good and would effect a cure, or help to do so, or help to break the addiction, he has violated no law and should be acquitted.

In ruling upon the demurrer Judge Sheppard, of the Northern District of Florida, who was sitting at the time in New York, expressed the opinion that the so-called "ambulatory treatment" was a perversion of the spirit of the Harrison Law and contrary to its reason, and that the validity of the indictment was in effect shown by the decisions of this court in the Webb and Doremus cases; but that, owing to the rulings to the contrary in the southern district of New York, he would sustain the demurrer, upon the ground, of course, that section 2 of the Harrison Narcotic Act, when properly construed, did not make the acts of the defendant, as set out in the indictment, a violation of the statute as a matter of law. (R. 5, 6.)

ASSIGNMENTS OF ERROR.

There are five assignments of error (R. 7, 8), but the main point is, as stated above, that the district court erred in construing the statute to the effect that the "ambulatory treatment" of drug addicts was not, in and of itself, as a matter of law, violative of the Harrison Narcotic Act.

ARGUMENT.

(*a*) It has already been argued in case No. 480, *United States* v. *Balint and Randazzo*, that the main enacting part of the second section, which forbids generally the sale or distribution of the drugs except upon an order form, contemplates merely an external standard and does not require either guilty knowledge or guilty intent upon the part of the defendant. The reasoning advanced and the authorities cited in the brief in No. 480 are referred to and adopted in this brief. The argument in case No. 480, if adopted by this court, has a tendency to show that the legislature did not intend, in any portion of the act (unless where expressly so provided), a subjective standard, nor to make a violation of the act by anyone depend upon the actor's intent or knowledge. That is to say, if the argument in case No. 480 be sound, an exception must be made from it in favor of physicians to sustain the subjective standard which the court below applied in the case at bar and which has been applied in other cases in the Federal courts.

(*b*) It will be observed, of course, that the provisions in the Harrison Narcotic Act relating to physicians and druggists are exceptions from the main enacting portion of the statute. Of course, it does not follow that, even though they are exceptions to a provision which requires no knowledge or intent, they themselves should be construed in the same manner; for it may be that Congress inserted the exceptions for the very purpose of excusing from liability physicians and druggists who had no knowledge of the facts essential to constitute the offense nor any intent to violate the law. It is necessary, therefore, to examine carefully the language of these exceptions in the light of the decisions of the Federal courts in order to determine therefrom whether or not the "ambulatory treatment" is within their terms.

(*c*) It will be observed that the first exception deals with the physician and the second with the druggist. The first excepts from the operation of the section the dispensing or distribution of the drugs by a physician "to a patient" and only, even to such a person, "in the course of his professional practice." The second excepts from the operation of the section the sale of the drug by the druggist pursuant to a written prescription issued by a physician, but (it is submitted) here also the prescription referred to must, in the nature of things, be a prescription "to a patient" and, even in that case, "in the course of his professional practice only." The vital words, therefore, in the construction of the

statute as respects the indictment in the case at bar are the words "patient" and the words "in the course of his professional practice only." The admitted facts of the case at bar, as alleged in the indictment and admitted by the demurrer, are that the defendant gave a prescription to a man whom he knew to be a drug addict, and suffering from no disease whatsoever except drug addiction, for drugs which the drug addict was to administer to himself when and how he chose, without any supervision or control whatsoever upon the part of the defendant or any agent of his. The question, therefore, resolves itself to this, viz, whether such action upon the part of the defendant can be called a dispensing or prescription of drugs to a patient in the course of his professional practice only, within the meaning of the Harrison Narcotic Act. In order that the matter may be made perfectly clear, it should be again insisted that, according to the indictment, the so-called "patient" in this case was suffering from no disease whatsoever except drug addiction. It must be admitted, for the purpose of the case at bar, that drug addiction is a disease, and that the defendant intended by his method of treatment to cure the same, and honestly believed that he could cure the disease by this method. Nevertheless, it is a well known fact, of which this court has taken notice, that drug addicts as a class are persons weakened materially in their sense of moral responsibility and in their power of will, and this court also knows, as a matter of common knowl-

edge, that, in any community where drugs are prescribed, there will be a large number of physicians to whom any construction of section 2 of the Harrison Narcotic Act will be applicable. The question, therefore, is whether every physician licensed and registered under the Harrison Narcotic Act, is at liberty, if he honestly believes such a course to be proper, to furnish to persons of the character of drug addicts the means to obtain the drugs without any supervision upon the part of the various doctors involved of the manner or time of taking the drugs or whether, indeed, the drugs are ever taken by the addict at all.

(*d*) As stated in the brief in case No. 480, the Harrison Narcotic Act had two purposes, viz, first, the collection of revenue by the Government, and, second, to prevent the use of the drugs in any other way than as a medicine. It will be helpful to take up the construction of the act in both of these aspects.

(1) In so far as the revenue feature of the act is concerned, the attention of this court is particularly called to the decision in *United States* v. *Rosenberg*, 251 Fed. 963, wherein, before the decision of this court in *United States* v. *Doremus*, 249 U. S. 86, Judge Learned Hand, in the southern district of New York, held the act constitutional as a revenue measure. In our judgment, the reasoning of Judge Hand is precisely the reasoning adopted by this court in the Doremus case, but, since Judge Hand analyzes the nature of the act from a revenue point of view

more at length than this court thought proper to do, his language is quoted:

> The tax being an excise, it was an essential part of its purpose that there should be no sales by unregistered persons. Yet the final sale must be to an unregistered person, the consumer. There was, therefore, a genuine difficulty in insuring that the sale to any unregistered person should be to a consumer, and that he should not in turn resell. Physicians were naturally the class who would dispense a large part of the drug to consumers, whether used as a medicine or to gratify an appetite. It was a reasonable contrivance to limit the final sales to physicians upon the theory that they were the most reliable of all available classes of distributors to insure its limitation to genuine consumers. I can not say, therefore, that it was not a fair piece of administrative machinery to empower this class exclusively to distribute the drug.
>
> The section does, however, go farther than this, because it forbids physicians selling opium except as a medicine, and it must be confessed that it may not be easy to see how this limitation can proceed from any other consideration than a policy of suppression. Nevertheless, it still seems to me to have enough relation to reality to save even this feature of the plan. We are to suppose that physicians are intrusted with the final distribution of opium as the class of sellers most likely to secure a distribution to consumers only. But the only two classes of consumers

are the sick and those who are addicted to it as the gratification of a morbid craving. Hence the effect of the limitation upon physicians' right to distribute is to cut off the second class of consumers. Has that prohibition any genuine relation to a statute aimed to require a license tax from all those who sell opium? On the whole, I think it can not be said not to have such a relation. Addicts to the use of opium are as a rule persons of greatly impaired will and of little sense of social obligation, and they usually demand relatively large quantities at frequent intervals. If they are given access to unlimited quantities, there is a genuine possibility that they might find it profitable to sell so much as their immediate needs did not require. As a class they would be most unlikely to observe any law which imposed upon them an excise as a condition of resale. Therefore, to shut them off from all right to the drug, even assuming that Congress must regard indifferently their demand and that of the sick, does not seem to me inevitably an irrelevant administrative measure. It is quite true that incidentally it shuts off the actual consumption of opium by addicts; but I do not understand that it is a good cause of complaint against an excise that in its incidents it may suppress some consumption. All that is necessary is that the limitation be appropriate to suppress sales which, if they did occur, would evade the law. If that be true, the incidental other results do not invalidate it.

Attention is expressly called to the statements of Judge Hand to the effect that the object of the act, looked at as a revenue measure, was to exclude addicts wholly from the class of consumers, for the reason that drugs placed in their hands without supervision would necessarily reach the channels of commerce and be sold and distributed without payment of any tax. In other words, Judge Hand's view was that if drug addicts were to be treated at all they must be treated as "patients"; that the Harrison Act meant to limit the term "patient" to those persons who were under the supervision of the doctor, to whom the drug was administered by him as a cure for a disease, whether that disease were drug addiction or something else; and that the term "patient" did not include a drug addict to whom the drug was furnished to be used at and in his own discretion. It is submitted that this view of Judge Hand's was in effect adopted by this court in the case of *United States* v. *Doremus*, where it was said (249 U. S. 94, 95):

> The provisions of § 2, to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to

> collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law. This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Ameris, being as the indictment charges an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax, at least Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue.

Following out this same line of thought, this court held in *Webb* v. *United States*, 249 U. S. 96, 99, 100, that an order issued by a doctor to an addict, not to cure him of his habit but merely to keep him comfortable by maintaining his customary use, could not be called a "prescription" within the meaning of exception (b) of section 2 of the Harrison Narcotic Act. This ruling was approved and again applied in the case of *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 194, where the court said:

> Manifestly the phrases "to a patient" and "in the course of his professional practice only" are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician's

> professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to the appetite or satisfy the the craving of one addicted to the use of the drug. A "prescription" issued for either of the latter purposes protects neither the physician who issues it nor the dealer who knowingly accepts and fills it. *Webb* v. *United States*, 249 U. S. 96.

It is true that in the Doremus, Webb, and Jin Fuey Moy cases it was assumed that the physician in prescribing the drugs in question did not honestly intend to effect a cure of the drug addiction and did not honestly believe that his method would effect a cure, but was merely administering the drug to satisfy the cravings of the addict; and that this court is asked in the case at bar to go beyond these decisions, and to hold that, irrespective of the physician's intent or belief, the act is violated where the drugs are placed by him in the sole control and subject to the unrestricted disposal of a drug addict. Yet, as said by Mr. Justice Holmes in the somewhat similar case of *Johnson* v. *United States*, 228 U. S. 457, 458: "Courts proceed step by step." No question in regard to the intent or belief of the physician was raised or was material in the cases under the Harrison Act referred to above or in the cases which are referred to later; and it was enough for the court to meet the question as then raised, without attempting to consider or discuss questions which were not before it. The principles, however, laid down in those decisions, in so far as they relate

to the revenue feature of the Act, do not seem to prevent, they rather seem to encourage, the conclusion that, irrespective of the intent or knowledge of the doctor, the transfer of drugs to an addict without any supervision whatsoever over him and his future course of conduct would not be, as a matter of law, the prescription of the drugs to a patient in the legitimate practice of a physician's profession. In other words, assuming the evil to be (as it must be assumed after the decisions of this court that it is) the loss of revenue to the United States by reason of the coming of the drugs into the hands of addicts who would dispose of the drugs to others, thereby causing them to enter the channels of commerce in such a manner as to deprive the Government of its tax, it is evident that this evil is just as imminent, in fact inevitable, if the drug be given to the addict without supervision, whether the physician believe that he is affecting a cure, or intend to effect a cure, or not. His belief or intention can not in any way whatsoever prevent the addict from acting in the usual manner in which addicts act, and consequently disposing of the drug to other persons, such as pedlars, and thus causing its sale and distribution without the payment of any tax. The case in this aspect of it clearly falls within the class of general revenue legislation, where the sole test is whether the effect of the actions of the defendant is to deprive the Government of its revenue, and where, consequently, the intent, knowledge, or belief of the defendant is wholly immaterial on the question of his liability,

because wholly immaterial as to the effect produced by his actions.

(2) In regard to the aspect of the Harrison Narcotic Act, viz, as a measure aimed to prevent drug addiction or the acquiring of the habit, the case made by the indictment at bar must be looked at in the same spirit in which this court looked at the third certified question in the Webb case. In the Webb case the same argument on principle could have been and was made to the effect that, if the physician wrote out a paper in the form of a prescription to a person who had come to him in the guise of a patient for a drug which is used in medicine, necessarily that paper must be a prescription. This court, however, refused to yield to the magic of mere words. It used its common sense, looked below the surface, and determined that in reality such a paper was not a prescription at all, differing in no respect from an order given by a person upon a retailer for the supplying of the drugs. If the question of the true meaning of the word "patient," and the words "in the course of his professional practice only" in section 2 of the Harrison Narcotic Act be looked at in this same spirit, in the light of common sense, it would seem that the same conclusion must be reached, viz, that a paper given to an addict calling for drugs to be disposed of by the addict himself in any manner he sees fit, and without any supervision upon the part of the physician, can not be called a "prescription" to a "patient" "in the course of his professional practice only."

As a matter of common sense, no drug addict can possibly be cured by any such method as this, and the whole method of treatment is a mere pretense (however honest the doctor may be in his belief and intentions) by which the addict obtains a store of drugs to suit his cravings and to dispose of for money if he so desires. As was said above, the case must be looked at in view of the fact that any construction placed upon section 2 of the act will necessarily apply to all the doctors who are licensed and registered under the Harrison Narcotic Act. If the "ambulatory treatment" be permissible to one, it is permissible to all. The result is that a drug addict may visit as many doctors as he please, may obtain from each of them the amount of the drug deemed necessary for him in his then condition, and may dispose of the drug so obtained in any manner he sees fit. To call such a practice as that a treatment of a patient in order to cure a disease is merely yielding to the magic of words, a thing this court refused to do in the Webb case. On the surface a drug addict, taking the ambulatory treatment, might be called a "patient;" and, on the surface, such a treatment might be said to be according to the professional practice of the physician, since it is alleged that it is given with the intent to cure the addiction. When, however, the matter is looked at below the surface, it can not but be perceived that the whole process of treating addicts by the "ambulatory treatment" is a mere subterfuge to conceal the real facts of the situation, viz, the supplying of

the addict with all the drug that he desires. Unless the addict can cure himself (a thing which everyone knows is impossible), no cure can be effected by any such method as this; and the only result is to transfer the distribution of the drugs from regular licensed dealers in them to physicians.

If this court had before it the very similar cases of alcohol or nicotine addiction, it surely could feel no doubt upon the subject. Let it be assumed that a physician purports to treat a drunkard by giving him a prescription for as much whiskey as he thinks he needs at that moment, to be obtained by the drunkard from a drug store and drunk at his own convenience or disposed of in any other way he sees fit. And let it be assumed that this may be done by a large number of physicians. Can anybody possibly say that such a treatment is a treatment of a patient in the ordinary course of the professional practice only? The very same thing might be said of the treatment of a person suffering from the addiction of tobacco. It is a misuse of terms to speak of the indiscriminate furnishing of whiskey or tobacco to an addict to be used by him at his discretion as the treatment of a patient in the course of professional practice. If it be a misuse of terms as repects whiskey and tobacco, it is equally a misuse of terms when applied to drug addiction.

Two recent cases in the Courts of Appeal may be referred to as significant of the validity of the above argument. In *Hoyt* v. *United States*, 273 Fed. 792, 796, 797, 698, the Court of Appeals for the Second

Circuit, in the course of affirming a judgment of conviction against a physician for violation of the Harrison Narcotic Act in prescribing to drug addicts, said:

> The defendant admitted that an addict could not be taken off the drug by the sole method of the drug being given to him to administer to himself; that is, by what is known as the ambulatory method. He admitted that, to take him off the drug, it was essential that the addicts should be put under absolute control. Nevertheless he was for long periods of time and for self-administration furnishing the drug to large numbers of persons over whom he had no control. There is abundant evidence in the record from which a jury might conclude that he was engaged in carrying on a mercantile business in selling narcotics, and was dispensing the drugs wholly outside of what under any theory of medicine could have been denominated professional practice only. * * *
>
> The Government, however, called to the stand as an expert witness a member of the staff of Bellevue Hospital in New York City, who had made a study of narcotic drug addiction, and who had treated thousands of such cases, and who testified fully on the subject. He testified that drug addiction can not be cured, except by putting a person into an institution where he can not get the drug; that that course is absolutely necessary. "Drug addicts themselves will tell you that, as long as they are out where they can get the drug, walking around, why, they will get it." His

> testimony was that in institutions heroin is never given, and that in cases where the gradual withdrawal method is pursued a patient is given as a rule one or two grains of morphine for a day, and that the drug is gradually withdrawn in the course of a week or ten days, until it is reduced to nothing. Then before he is permitted to leave the institution he is kept confined for six weeks or two months and given treatment to build up his general health. There are other methods, such as the rapid withdrawal method and the sudden withdrawal method. He testified that all the various methods of treating drug addiction involved taking the patient off the drug. A hypothetical question was put to the witness, justified by the evidence in the case, and he was asked whether in his opinion the method pursued by the physician could be regarded as "a method of promoting the cure of a drug addict," and he replied that it could not.

In *Barbot* v. *United States*, 273 Fed. 919, 921, the Court of Appeals of the Fourth Circuit, in affirming the judgment of conviction in a similar case, said:

> A careful review of the decisions as they exist at the present time make clear the fact that, when a physician is charged with unlawfully selling or prescribing drugs under the Harrison Act, the case turns largely upon his good faith in prescribing drugs to his regular patients, for maladies requiring the administration of the drug, or whether he prescribed for persons seeking his professional aid merely

> to procure the drug. In the latter case the physician might, perhaps, in a single instance afford temporary relief for one whose condition demanded immediate treatment. To go further than this would enable every doctor to do just what the defendant did here—furnish the drug to addicts, or afford opportunity to them to procure all the narcotics they desired; as, unrestrained, they would go from one physician to another, and quickly destroy the whole purpose of the act in question.

It is true, as indicated above with reference to the decisions of this court in the Doremus and Webb cases, that in these two decisions of the Courts of Appeal it was assumed that, if the physician prescribed the drugs in an honest effort to cure the disease of drug addiction, he was not guilty of an offense; but (to repeat) this was because the courts did not have to go any further in the cases then before them. The reasonable conclusion to be drawn from their own reasoning is that the "ambulatory treatment" is in and of itself, as a matter of law, a violation of the Harrison Narcotic Act, for the reason that it is not the treatment of a "patient" "in the course of professional practice."

The judgment of the court below should be reversed.

JAMES M. BECK,
Solicitor General.
WILLIAM C. HERRON,
Attorney.

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No. 582

In the Supreme Court of the United States

OCTOBER TERM, 1921.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

MORRIS BEHRMAN, DEFENDANT IN ERROR.

ON ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

IN THE

SUPREME COURT OF THE UNITED STATES

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ON ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

The case and question involved herein are correctly stated in the government's brief, wherein the relevant portion of the statute and the entire indictment are placed before the court. But throughout the brief are excesses of statement which if accepted at face value might mislead the court, a result, which however we do not fear. Therefore, we shall discuss the very point of law without any special criticism of the Government Brief, because of undue coloring. That brief correctly states the question involved in the words; "The ques-

tion raised by the indictment and the demurrer thereto, and decided by the court adversely to the United States".

It is important in such a case that the discussion be not allowed to drift into needless distinctions; nor is clarity attained by the introduction of confusing terms not found in the statute or indictment. For instance, in the brief that we are answering, considerable space is devoted to what is designated as "ambulatory treatment", whereas the real question is whether the acts charged constitute an offence within the language actually used in the Statute.

It requires a strained, indeed a non-permissible, construction to bring the administration, direct or through prescriptions of the narcotics specified, within the terms or meaning of the act, even if exceptions "(a)" and "(b)" had not been inserted. To see this we only have to note the first sentence of said statute as set forth by the government and call to mind the uniform, almost invariable, methods of practice by the medical profession. The first sentence is in these words: "It shall be unlawful for any person to sell, barter, exchange or given away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue". Now a physician in treating a patient and prescribing for him does not either sell, barter, exchange or give away the medicine or medicines, which he prescribes. The prescription embodies professional advice for which the patient pays. He does not buy the prescription, but pays for the advice. The order must not only have to be issued in blank by

the Commissioner of Internal Revenue but it must be the order "of the person to whom such article is sold, bartered, exchanged or given." Now a physician neither buys, barters for nor takes in exchange, or as a gift the medicines which he advises the patient to take in the giving of a prescription, which, as is common knowledge, seldom if ever has the form of an order. And this statute differentiates amply for our present purpose prescriptions from the commercial orders meant in the language above quoted. In exception (b), prescriptions are placed in a distinct category from such orders. That the "written order" required to be presented by an ordinary purchaser is in a category other than the prescription is further shown by the requirement of different modes of authentication. The written order must be on a written blank furnished by the Commissioner of Internal Revenue. This order is that of the person to whom the sale etc. is made. But in the exception "(b)" the written prescription which the purchaser uses and to which the statute does not apply, "shall be dated as of the day on which it is signed by the physician who shall have issued the same".

The indictment sufficiently alleges compliance by the defendant with all the prescribed formalities for prescriptions. But, seemingly, through abundance of caution, Congress has inserted in the act exceptions (a) and (b). The statute says: "Nothing contained in this section shall apply: (a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice only." The proviso which completes that exception is

not relevant nor is any portion of exception "(b)" relevant, except that the latter furnishes conclusive evidence that Congress had in mind the common or uniform method by which the exempted classes practice their professions, namely by delivering written prescriptions. In other words, Congress recognized that civilization embraces a profession of numerous and, for a most part, highly esteemed membership, upon whom afflicted, diseased, crippled and dying humanity leans in pain and anguish. And, now, with no justifying words in the statute, plaintiff would interpolate a meaning to exclude those constituting a large class designated as "addicts", where the purpose is merely relief from pain and not to effect a cure. But even if we conceded the correctness of that extreme view it would not save this indictment, as is more fully shown hereinafter.

The statute contains not a word of limitation upon words "professional practice only," nor does it use the term, "addict" or any reference whatever to any class of patients or diseases, and the government admits that addiction is a disease. We freely admit that the statute may be violated surreptitiously, and that an indictment could be framed which would hold good against demurrer however apparently regular the procedure of the physician. Of course a prescription could be resorted to by a regular licensed physician as a mere subterfuge for effecting a sale. But such indictment would have to differ considerable from this indictment. Not only is there a total absence of allegation of bad faith, unlawful intent and irregularity, but language is used clearly warranting a contrary presumption in each and all of these respects. We find it alleged that the defendant

was "duly licensed to practice as such physician, and duly registered". And while the papers delivered to the said Willie King are termed orders, it is alleged that they were "in the form of prescriptions signed by him" (defendant). Further along it is alleged that the "said drugs were obtained from said Samuel Siegel pursuant to the said three orders, in the form of prescriptions." In other words Willie King diseased with "addiction" procured from the defendant, a physician duly licensed, etc., three prescriptions for specified quantities of the narcotics mentioned in the statute, and these prescriptions were filled by Samuel Siegel a duly registered pharmacist, which brings the case within exception "(a)" within the purview of the preceding portion of the section in the light of exception "(b)".

There are other allegations tending to exclude the inference of a fraudulent intent or any evasive conduct, such as effecting a sale violative of the revenue phase of the act. It is alleged that "all of said drugs were put in the physical possession and control of said Willie King with the intention on the part of the defendant that said Willie King would use same by self-administration in divided doses over a period of several days the amount of each of said drugs dispensed as aforesaid being more than sufficient or necessary to satisfy the craving of the said Willie King therefor if consumed by him all at one time." In other words, he intended that said Willie King should use same by self-administration in divided doses "over a period of several days." In the government's brief, the amount of drugs is designated as "large", but the allegation that the drugs were to be self-administered in divided doses "over a

period of several days" seems to negative, or at any rate modify any such inference. The court might infer as a matter of common knowledge that the quantity would be excessive if a limited number of doses were specified, but in this case, owing to the indefiniteness of "several days" we have no data to justify an inference that the quantity was large.

The Government's Contention Fails on Authorities.

The Government says in its brief (p. 10: "There are five assignments of errors (R., 7, 8), but the main point is, as stated above, that the district court error in construing the statute to the effect that the "ambulatory treatment" of drug addicts was not, in and of itself as matter of law, violative of the Harrison Narcotic Act." In other words, the government contends that the case alleged in the indictment is not one within the exceptions, while our contention is that, it is within the exceptions and not within the prohibitions, upon reasonable construction. In substance, the same question is raised by our objection based on the insufficiency of the indictment (R. 5) in these words:

That the facts alleged in said indictment do not constitute a crime, because they are consistent with defendant's innocence and an honest and sincere purpose and intention on his part to cure Willie King of his addiction to the use of the drugs dispensed, or to permanently better his physical condition due to such addiction.

All the cases decided under the act and cited by the Government preceding its discussion of the Hoyt and Barbot cases, are so disposed of by its counsel, after

citing and analyzing them, that we are relieved of the onus of their discussion, and we concur in the following quotation from said brief (P. 18):

> "It is true that in the Doremus, Webb and Jin Fuey Moy cases it was assumed that the physician in prescribing the drugs in question did not honestly intend to effect a cure of the drug addiction and did not honestly believe that his method would effect a cure, but was merely administering the drug to satisfy the cravings of the addict; and that this court is asked in the case at bar to go beyond these decisions and to hold that irrespective of the physicians intent or belief, the act is violated where the drugs are placed by him in the sole control and subject to the unrestricted disposal of the drug addict. Yet, as was said by Mr. Justice Holmes in the somewhat similar case of Johnson *vs.* United States, 228 U. S. 457, 456, 'Courts proceed step by step.' No question in regard to the intent or belief of the physician was raised or was material in the cases under the Harrison Act referred to above, or in the cases which are referred to later; and it was enough for the court to meet the questions then raised, without attempting to consider or discuss the questions which were not before it."

Whatever else may be said of the language just quoted it conveys unmistakeably the information that an extension of the vindicatory provisions of the Act to a new class of cases is sought; also that the decisions so far rendered do not support the desired extension and that a precedent to accomplish it is now sought.

Though, as presently shown, we are not required to go so far, yet for humane reasons, we urge that any con-

struction which would forbid and penalize the giving of a prescription to afford temporary relief, even though a cure was not in immediate contemplation, would be a harsh construction not warranted by any language in the statute.

In the two other cases cited by the Government, cited to support its contention, we find its contention is unsupported. We here renew our previous concession that there may be an indictable and punishable violation of the statute under color of practicing medicine and in the use of prescriptions. But we insist that while the cases so cited go to the extreme limit of culpability in such cases, they do not go far enough to save the indictment in this case. In Hoyt *vs.* United States, 273 U. S. 792, (at page 797) we find, not quoted in plaintiff's briefs but going further in support of its contention than the quotation made, the following, and yet falling short: "It may be true that a physician's method of treatment of drug addiction is a question to be determined by the physician himself, and not the jury; but it can only be true so long as the physician is pursuing his method in his honest endeavor to effect a cure. If that is not his purpose, and he is dispensing the drug to keep the addict comfortable he is violating the law."

Now in this indictment there is not a word to indicate that the defendant gave the prescription merely that the addict might make himself comfortable or that negatives the presumption that it was given with the intention of effecting a cure. The allegation which approaches nearest the hypothetical case of culpability indicated in the above quotation in these words: "that on

said date the said Willie King was a person addicted to the habitual use of morphine, heroin and cocaine, and known by the defendant to be so addicted; that on said date the said Willie King did not require the administration of either morphine, heroin or cocaine by reason of any disease or condition other than such addiction, and the defendant did not dispense said drugs or any of them to said Willie King for the treating of any disease or condition other than said addiction". Let's note that in the above quotation of the most extreme view that can be found the Court says: "It may be true that a physician's method of treatment of drug addiction is a question to be determined by the physician himself and not by a jury," which is followed by the qualification to the effect that it can only be true so long as the physician proceeds with the honest endeavor to effect a cure, in which we might, if necessary also fully concur, since there is not here to be found even the semblance of an allegation negativing the honest endeavor which the law imputes.

The view in the Hoyt case above noticed goes beyond that expressed in other Federal Courts in cases under the Harrison Act. In the Barbot case cited and quoted in the brief we find language clearly supporting our contention that the indictment is fatally defective in its failure to specify the purpose of the defendant in administering the drugs, whether to effect a cure or afford temporary relief. In the Barbot, as in the Hoyt case, the professional character of the defendant was flagrantly prostituted and he became a wholesale and retail dealer in the drugs mentioned in the statute, dispensing them in quantities large and small, to whomsoever asked for them and paid the

price. But in the opinion is found language evidencing a disagreement with the view that the drug can never be prescribed merely to afford temporary relief. The Court said, (at p. 921, 273 Fed. R.), "A careful review of the decisions as they exist at the present time make clear the fact, that, where a physician is charged with unlawfully selling or prescribing drugs under the Harrison Act, the case turns largely upon his good faith in prescribing drugs to his regular patients for maladies requiring the administration of the drug, or whether he prescribed for persons seeking his professional aid merely to procure the drug. *In the latter case the physician might, perhaps, in a single instance, afford temporary relief for one whose condition demanded immediate treatment.*" We have underscored certain significant and relevant words.

It was not necessary that the said Willie King should have been under the direct control of the defendant to constitute said King defendant's "patient", within the meaning of the statute, as the term is there used.

If said King applied to the defendant for professional treatment, the former thereby became the latter's patient. Such is the purport of the opinion in Jin Fuey Moy *vs.* U. S. (254 U. S. 189) per Mr. Justice Pitney, as follows: "Manifestly the phrase 'to the patient' and 'in the course of his professional practice only' are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the Act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to

the appetite or satisfy the craving of one addicted to the use of the drug. A 'prescription' issued for either of the latter purposes protects neither the physician who issues it nor the dealer who knowingly accepts and fills it." We may safely accept this as a correct statement of the rule or principle which should govern the present and all other such cases. There is nothing in the indictment which has the slightest tendency to align the defendant in an attitude in conflict with the rule so stated by this honorable Court.

The abandonment of all Assignments of Error, except the 5th, does not of course preclude the defendant from urging defects in the indictment other than that embodied in the preceding objections.

Therefore in order to save any points for the Court's consideration, which we may have inadvertently overlooked, we reiterate the first ground of demurrer to the indictment in these words: "That the facts alleged in said indictment do not constitute a crime."

Also, since Judge Shepard, in sustaining the demurrer, expressed concurrence with Judge Knox of the same Court, who sustained a like demurrer in a similar case, in U. S. *vs.* Balint and Randazzo, (June 28th, 1921) on the same ground embodied in the defendant's fourth ground of demurrer in this case, (R. 4, 5) we here also rely on said fourth ground, which, is in these words: *Fourth: That the facts alleged in said indictment, do not constitute a crime, because it is not therein alleged that the defendant dispensed said drugs wilfully, and there is no allegation that the defendant in dispensing said drugs acted with criminal intent, and no allegation*

from which it can be inferred that defendant acted wilfully or with criminal intent.

We also append the opinion of Judge Knox in said Balint and Randazzo case as follows:

> "Section 2 of the so-called Harrison Narcotic Law provides that 'It shall be unlawful for any person to sell, barter, exchange or give away' any compound, manufacture or derivative of opium or of cocoa leaves' except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.
>
> In an indictment of two counts, each of which follows the words of the statute, the defendants are charged with doing the prohibited acts. To this indictment both defendants have demurred upon the ground that neither count thereof contains any allegation of scienter upon the part of the defendants.
>
> The Government contends that such allegation is unnecessary by reason of the fact that the statute makes no provision that the crimes denounced thereby should be knowingly and wilfully committed, and cites in support of its position the line of cases of which U. S. *vs.* Malone, 9 Fed. 897 (unlawful distilling); Shevlin-Carpenter Co. *vs.* State of Minnesota, 218 U. S. 57 (The unlawful cutting of timber); and Armour Packing Co. *vs.* U. S., 209 U. S. 56 (involving the departure from filed and published interstate commerce tariffs), are familiar examples.
>
> In the last-mentioned case it was said 'While intent is in a certain sense essential to the commission of a crime, and in some cases it is neces-

sary to show moral turpitude in order to make out a crime, there is a class of cases * * * where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong.'

But isn't it true that such violations of the Harrison Law, as are most frequently prosecuted involve turpitude and moral wrong?

In U. S. *vs.* Jin Fuey Moy, 241 U. S. 394, 402, the Supreme Court, while sustaining the Harrison Law upon the ground that it was a revenue measure, nevertheless said that 'It may be assumed that the statute has a moral end as well as revenue in view * * *', and, considering the severity of the punishment which may be imposed upon persons guilty of violating the provisions of the statute, there is ample support for such statement.

Indeed, by way of argument that scienter is not a necessary ingredient of the crime charged against the defendants, the Government says that the failure of Congress to use the words 'wilfully and knowingly' in defining the offense complained of indicates that the act 'is both a revenue measure and remedial, having for its purpose not only the raising of revenue and the prevention of fraud, in that direction, but also the moral end of preventing the dissemination of cocaine and morphine drugs of great potential danger to the public when improperly used, and that those who deal in such drugs do so at their peril * * *'.

It thus seems to me that an unlawful sale of narcotics is of such nature as properly to be regarded as *malum in se*, and to thus necessitate, in an indictment therefor, words of scienter.

For all that is said against these defendants, they may not purposely have sold the narcotics; and such must have been their purpose even under the Armour Packing Co. case (supra).

For these reasons I hold the demurrer well taken, and the same will be sustained."

WHEREFORE, we respectfully ask that the Writ of Error be dismissed.

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UNITED STATES *v.* BEHRMAN.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 582. Argued March 7, 1922.—Decided March 27, 1922.

1. An exception in a statute defining an offense is met in an indictment by alleging facts sufficient to show that the defendant was not within the exception. P. 287.
2. An indictment need only describe the crime with sufficient clearness to show the violation of law and to inform the defendant of the nature and cause of the accusation and enable him to plead the judgment, if any, in bar of further prosecution for the same offense. P. 288.
3. An indictment for a statutory offense need not charge *scienter* or intent if the statute does not make them elements. P. 288.
4. Under the Anti-Narcotic Act of December 17, 1914, c. 1, § 2, 38 Stat. 785, making it an offense to sell, barter, exchange or give away certain drugs except in pursuance of a written order of the person to whom such article is to be sold, etc., on an official form, and providing that nothing in the section shall apply to the dispensing or distribution of the drugs to a patient by a registered physician in the course of his professional practice only, or to their sale, dispensing or distribution by a dealer to a consumer in pursuance of a written prescription issued by a registered physician, such a physician commits the offense if, knowing a person to be habitually addicted to the use of such drugs, and not purposing to treat him for any other disease, he issues him prescrip-

tions for quantities sufficient to make a great number of doses, more than enough to satisfy his craving if all consumed at one time, intending that he shall use them by self-administration in divided doses over a period of several days, and thus enables the addict to obtain such excessive quantities, without other order, from a pharmacist, and to have them in his possession and control with no other restraint upon their administration or disposition than his own weakened will. P. 288.

Reversed.

ERROR to a judgment of the District Court sustaining a demurrer to an indictment.

Mr. William C. Herron, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

The main enacting part of § 2 contemplates merely an external standard and does not require either guilty knowledge or guilty intent. The question is whether the defendant's action can be called a dispensing or prescription of drugs to a patient in the course of defendant's professional practice only, within the meaning of the exceptions. The so-called "patient" in this case was suffering from no disease except drug addiction. It must be admitted that that is a disease, and that the defendant intended by his method of treatment to cure it, and honestly believed that he could, by this method. Nevertheless, it is a well known fact, of which this court has taken notice, that drug addicts as a class are persons weakened materially in their sense of moral responsibility and in their power of will, and this court also knows, as a matter of common knowledge, that, in any community where drugs are prescribed, there will be a large number of physicians to whom any construction of § 2 will be applicable. The question, therefore, is whether every physician licensed and registered under the act is at liberty, if he honestly believes such a course to be proper, to furnish to drug addicts the means to obtain the drugs without any supervision upon the part of the various doctors in-

volved of the manner or time of taking or other disposition of the drugs.

In so far as the revenue feature of the act is concerned, see *United States* v. *Rosenberg*, 251 Fed. 963; *United States* v. *Doremus*, 249 U. S. 86; *Webb* v. *United States*, 249 U. S. 96, 99, 100; *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 194.

While no question in regard to the intent or belief of the physician was raised or was material in the cases referred to, the principles laid down in them, in so far as they relate to the revenue feature, seem to encourage the conclusion that, irrespective of the intent or knowledge, the transfer of drugs without any supervision whatsoever would not be, as a matter of law, the prescription of the drugs to a patient in the legitimate practice of a physician's profession. In regard to the aspect of the act as a measure aimed to prevent drug addiction, the case made by the indictment must be looked at in the same spirit in which this court looked at the third certified question in the *Webb Case*. As a matter of common sense, no drug addict can possibly be cured by any such method as this, and the whole method of treatment is a mere pretense, however honest the doctor may be in his belief and intentions, by which the addict obtains a store of drugs to suit his cravings and to dispose of them for money if he so desires. A drug addict might visit many doctors and obtain drugs from all of them. The result would be to transfer the distribution of the drugs from regular licensed dealers to physicians.

See *Hoyt* v. *United States*, 273 Fed. 792; *Barbot* v. *United States*, 273 Fed. 919.

Mr. Thomas C. Spelling, for defendant in error, submitted.

It requires a strained, indeed a nonpermissible, construction to bring the administration, direct or through

prescriptions, of the narcotics specified, within the terms or meaning of the act, even if exceptions (a) and (b) had not been inserted. A physician in treating a patient and prescribing for him does not either sell, barter, exchange or give away the medicine which he prescribes. The prescription embodies professional advice for which the patient pays. He does not buy the prescription, but pays for the advice. The order must not only be issued on an official blank, but it must be the order "of the person to whom such article is sold, bartered, exchanged, or given." The statute differentiates amply for our present purpose prescriptions from the commercial orders intended.

In exception (b), prescriptions are placed in a distinct category from such orders. That the "written order" required to be presented by an ordinary purchaser is in a category other than the prescription is further shown by the requirement of different modes of authentication. In exception (b) the written prescription which the purchaser uses and to which the statute does not apply, "shall be dated as of the day on which it is signed by the physician who shall have issued the same."

The statute says: "Nothing contained in this section shall apply: (a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician . . . registered under this act in the course of his professional practice only." The proviso which completes that exception is not relevant nor is any portion of exception (b) relevant, except that the latter furnishes conclusive evidence that Congress had in mind the common or uniform method by which the exempted classes practice their professions, namely, by delivering written prescriptions. In other words, Congress recognized that civilization embraces a profession of numerous and, for the most part, highly esteemed membership, upon whom afflicted, diseased, crippled and dying humanity leans in pain and anguish. And, now, with no justifying words in the stat-

volved of the manner or time of taking or other disposition of the drugs.

In so far as the revenue feature of the act is concerned, see *United States* v. *Rosenberg*, 251 Fed. 963; *United States* v. *Doremus*, 249 U. S. 86; *Webb* v. *United States*, 249 U. S. 96, 99, 100; *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 194.

While no question in regard to the intent or belief of the physician was raised or was material in the cases referred to, the principles laid down in them, in so far as they relate to the revenue feature, seem to encourage the conclusion that, irrespective of the intent or knowledge, the transfer of drugs without any supervision whatsoever would not be, as a matter of law, the prescription of the drugs to a patient in the legitimate practice of a physician's profession. In regard to the aspect of the act as a measure aimed to prevent drug addiction, the case made by the indictment must be looked at in the same spirit in which this court looked at the third certified question in the *Webb Case*. As a matter of common sense, no drug addict can possibly be cured by any such method as this, and the whole method of treatment is a mere pretense, however honest the doctor may be in his belief and intentions, by which the addict obtains a store of drugs to suit his cravings and to dispose of them for money if he so desires. A drug addict might visit many doctors and obtain drugs from all of them. The result would be to transfer the distribution of the drugs from regular licensed dealers to physicians.

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In exception (b), prescriptions are placed in a distinct category from such orders. That the "written order" required to be presented by an ordinary purchaser is in a category other than the prescription is further shown by the requirement of different modes of authentication. In exception (b) the written prescription which the purchaser uses and to which the statute does not apply, "shall be dated as of the day on which it is signed by the physician who shall have issued the same."

The statute says: "Nothing contained in this section shall apply: (a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician . . . registered under this act in the course of his professional practice only." The proviso which completes that exception is not relevant nor is any portion of exception (b) relevant, except that the latter furnishes conclusive evidence that Congress had in mind the common or uniform method by which the exempted classes practice their professions, namely, by delivering written prescriptions. In other words, Congress recognized that civilization embraces a profession of numerous and, for the most part, highly esteemed membership, upon whom afflicted, diseased, crippled and dying humanity leans in pain and anguish. And, now, with no justifying words in the stat-

ute, plaintiff would interpolate a meaning to exclude those constituting a large class designated as "addicts," where the purpose is merely relief from pain and not to effect a cure. But even if we conceded the correctness of that extreme view it would not save this indictment.

The statute contains not a word of limitation upon the words "professional practice only," nor does it use the term "addict", or any reference whatever to any class of patients or diseases, and the Government admits that addiction is a disease. Of course, a prescription could be resorted to by a regular licensed physician as a mere subterfuge for effecting a sale. But, here, not only is there a total absence of allegation of bad faith, unlawful intent and irregularity, but language is used clearly warranting a contrary presumption in each and all of these respects.

The Government argues that the amount of drugs is designated as "large", but the allegation that the drugs were to be self-administered in divided doses "over a period of several days" seems to negative or modify any such inference. The court might infer as a matter of common knowledge that the quantity would be excessive if a limited number of doses were specified, but in this case, owing to the indefiniteness of "several days" we have no data to justify an inference that the quantity was large.

The facts alleged do not constitute a crime, because they are consistent with defendant's innocence and an honest and sincere purpose to cure King of his addiction to the use of the drugs dispensed, or to permanently better his physical condition due to such addiction.

The Government's argument is an admission that the decisions so far rendered do not support the desired extension and that a precedent to accomplish it is now sought.

Though we are not required to go so far, yet for humane reasons, we urge that any construction which would for-

bid and penalize the giving of a prescription to afford temporary relief, even though a cure was not in immediate contemplation, would be a harsh construction not warranted by any language in the statute.

In this indictment there is not a word to indicate that the defendant gave the prescription merely that the addict might make himself comfortable or that negatives the presumption that it was given with the intention of effecting a cure. *Hoyt* v. *United States,* 273 Fed. 792; *Barbot* v. *United States,* 273 Fed. 919.

It was not necessary that King should have been under the direct control of the defendant to constitute him a "patient" within the meaning of the statute, as the term is there used. *Jin Fuey Moy* v. *United States,* 254 U. S. 189; *United States* v. *Balint,* D. C. So. Dist. N. Y., June 28, 1921, unreported. See s. c., *ante,* 250.

MR. JUSTICE DAY delivered the opinion of the court.

This case is here under the Criminal Appeals Act, 34 Stat. 1246. The statute involved is the Narcotic Drug Act of December 17, 1914, c. 1, § 2, a, 38 Stat. 785, 786.

This statute in § 2, subdivision a, makes it an offense to sell, barter, exchange, or give away any of the narcotic drugs named in the act except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. It is further provided that nothing in the section shall apply to the dispensing or distribution of any of the drugs to a patient by a registered physician in the course of his professional practice only, or to the sale, dispensing or distribution of said drugs by a dealer to a consumer in pursuance of a written prescription issued by a physician registered under the act.

The indictment charges that the defendant did unlawfully sell, barter, and give to Willie King a compound, manufacture, and derivative of opium, to wit, 150 grains of heroin and 360 grains of morphine, and a compound, manufacture, and derivative of coca leaves, to wit, 210 grains of cocaine, not in pursuance of any written order of King on a form issued for that purpose by the Commissioner of Internal Revenue of the United States; that the defendant was a duly licensed physician and registered under the act; and issued three written orders to the said King in the form of prescriptions signed by him, which prescriptions called for the delivery to King of the amount of drugs above described; that the defendant intended that King should obtain the drugs from the druggist upon the said orders; that King did obtain upon said orders drugs of the amount and kind above described pursuant to the said prescriptions; that King was a person addicted to the habitual use of morphine, heroin and cocaine, and known by the defendant to be so addicted; that King did not require the administration of either morphine, heroin, or cocaine by reason of any disease other than such addiction; that defendant did not dispense any of the drugs for the purpose of treating any disease or condition other than such addiction; that none of the drugs so dispensed by the defendant was administered to or intended by the defendant to be administered to King by the defendant or any nurse, or person acting under the direction of the defendant; nor were any of the drugs consumed or intended to be consumed by King in the presence of the defendant, but that all of the drugs were put in the possession or control of King with the intention on the part of the defendant that King would use the same by self-administration in divided doses over a period of several days, the amount of each of said drugs dispensed being more than sufficient or necessary to satisfy the craving of King therefor if consumed by him all at one

time; that King was not in any way restrained or prevented from disposing of the drugs in any manner he saw fit; and that the drugs so dispensed by the defendant were in the form in which said drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their craving therefor, and were adapted for such consumption.

The question is: Do the acts charged in this indictment constitute an offense within the meaning of the statute? As we have seen, the statute contains an exception to the effect that it shall not apply to the dispensing or distribution of such drugs to a patient by a registered physician in the course of his professional practice only, nor to the sale, dispensing or distribution of the drugs by a dealer to a consumer under a written prescription by a registered physician. The rule applicable to such statutes is that it is enough to charge facts sufficient to show that the accused is not within the exception. *United States* v. *Cook,* 17 Wall. 168, 173.

The District Judge who heard this case was of the opinion that prescriptions in the regular course of practice did not include the indiscriminate doling out of narcotics in such quantity to addicts as charged in the indictment, but out of deference to what he deemed to be the view of a local District Judge in another case announced his willingness to follow such opinion until the question could be passed upon by this court, and sustained the demurrer. In our opinion the District Judge who heard the case was right in his conclusion and should have overruled the demurrer.

Former decisions of this court have held that the purpose of the exception is to confine the distribution of these drugs to the regular and lawful course of professional practice, and that not everything called a prescription is necessarily such. *Webb* v. *United States,* 249 U. S. 96; *Jin Fuey Moy* v. *United States,* 254 U. S. 189.

Of this phase of the act this court said in the *Jin Fuey Moy Case*, p. 194:

"Manifestly the phrases 'to a patient' and 'in the course of his professional practice only' are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A 'prescription' issued for either of the latter purposes protects neither the physician who issues it nor the dealer who knowingly accepts and fills it. *Webb* v. *United States*, 249 U. S. 96."

It is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law, and to enable the accused to know the nature and cause of the accusation and to plead the judgment, if one be rendered, in bar of further prosecution for the same offense. If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent. *United States* v. *Smith*, 2 Mason, 143; *United States* v. *Miller*, Fed. Cas. 15,775; *United States* v. *Jacoby*, Fed. Cas. 15,462; *United States* v. *Ulrici*, Fed. Cas. 16,594, (opinion by Miller, Circuit Justice); *United States* v. *Bayaud*, 16 Fed. 376, 383–4; *United States* v. *Jackson*, 25 Fed. 548, 550; *United States* v. *Guthrie*, 171 Fed. 528, 531; *United States* v. *Balint, ante*, 250.

It may be admitted that to prescribe a single dose, or even a number of doses, may not bring a physician within the penalties of the act; but what is here charged is that the defendant physician by means of prescriptions has enabled one, known by him to be an addict, to obtain from a pharmacist the enormous number of doses contained in 150 grains of heroin, 360 grains of morphine,

and 210 grains of cocaine. As shown by Wood's United States Dispensatory, a standard work in general use, the ordinary dose of morphine is one-fifth of a grain, of cocaine one-eighth to one-fourth of a grain, of heroin one-sixteenth to one-eighth of a grain. By these standards more than three thousand ordinary doses were placed in the control of King. Undoubtedly doses may be varied to suit different cases as determined by the judgment of a physician. But the quantities named in the indictment are charged to have been entrusted to a person known by the physician to be an addict without restraint upon him in its administration or disposition by anything more than his own weakened and perverted will. Such so-called prescriptions could only result in the gratification of a diseased appetite for these pernicious drugs or result in an unlawful parting with them to others in violation of the act as heretofore interpreted in this court within the principles laid down in the *Webb* and *Jin Fuey Moy Cases, supra.*

We hold that the acts charged in the indictment constituted an offense within the terms and meaning of the act. The judgment of the District Court to the contrary should be reversed.

Reversed.

MR. JUSTICE HOLMES, with whom concurred MR. JUSTICE MCREYNOLDS and MR. JUSTICE BRANDEIS, dissenting.

If this case raised a question of pleading I should go far in agreeing to disregard technicalities that were deemed vital a hundred or perhaps even fifty years ago. But we have nothing to do with pleading as such, and as the judge below held the indictment bad it can be sustained only upon a construction of the statute different from that adopted below.

The indictment for the very purpose of raising the issue that divides the Court alleges in terms that the drugs

were intended by the defendant to be used by King in divided doses over a period of several days. The defendant was a licensed physician and his part in the sale was the giving of prescriptions for the drugs. In view of the allegation that I have quoted and the absence of any charge to the contrary it must be assumed that he gave them in the regular course of his practice and in good faith. Whatever ground for scepticism we may find in the facts we are bound to accept the position knowingly and deliberately taken by the pleader and evidently accepted by the Court below.

It seems to me impossible to construe the statute as tacitly making such acts, however foolish, crimes, by saying that what is in form a prescription and is given honestly in the course of a doctor's practice, and therefore, so far as the words of the statute go, is allowed in terms, is not within the words, is not a prescription and is not given in the course of practice, if the Court deems the doctor's faith in his patient manifestly unwarranted. It seems to me wrong to construe the statute as creating a crime in this way without a word of warning. Of course the facts alleged suggest an indictment in a different form, but the Government preferred to trust to a strained interpretation of the law rather than to the finding of a jury upon the facts. I think that the judgment should be affirmed.